No. 83-1345

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNION CARBIDE CORPORATION, ET AL., PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court erred in denying motions to vacate or modify a consent decree originally entered into by the Environmental Protection Agency eight years ago.

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OPINIONS BELOW

The opinion of the court of appeals dated October 4, 1983 (Pet. App. 1a-44a), is reported at 718 F.2d 1117. The corresponding opinions of the district court (Pet. App. 103a-114a and 117a-120a) are reported unofficially at 16 Env't Rep. Cas. (BNA) 2084, and 17 Env't Rep. Cas. (BNA) 2013, respectively. The opinion of the court of appeals dated September 16, 1980 (46a-100a), is reported at 636 F.2d 1229. The corresponding opinion of the district court, dated March 9, 1979 (Pet. App. 121a-138a), is reported unofficially at 12 Env't Rep. Cas. (BNA) 1833.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1983 (Pet. App. 195a-202a). A petition for rehearing and suggestion for rehearing en banc was denied on November 18, 1983 (Pet. App. 203a-204a, 205a-206a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves a consent decree originally approved and entered by the district court in 1976 in settlement of four lawsuits brought by the Natural Resources Defense Council, Inc., et al. (NRDC) against various officials of the Environmental Protection Agency (EPA). The suits concerned EPA's alleged failure to implement Sections 307(a) and 307(b) of the Federal Water Pollution Control Act as then in effect, 33 U.S.C. (1976 ed.) 1317(a) and 1317(b). As enacted in 1972, Section 307(a) directed the Administrator of EPA, within 90 days after enactment, to publish a list of toxic pollutants based upon several criteria, including toxicity, persistence, and degradability of the pollutant. Within 180 days thereafter, he was directed to propose effluent standards for each pollutant based upon the same factors, and within six months thereafter, he was to promulgate final effluent standards. Section 307(b) of the Act required the Administrator, within 180 days after enactment, to propose pretreatment standards "for introduction of pollutants into [publicly-owned treatment works] * * * for those pollutants which are determined not to be susceptible to treatment by such treatment works or which would interfere with the operation of such treatment works." Within 90 days after proposal, he was di-

rected to promulgate final pretreatment standards for such pollutants. *Ibid.* These pretreatment standards were to apply to industrial categories. 33 U.S.C. (1976 ed.) 1317(c).

In one suit, NRDC claimed that EPA's criteria for identifying toxic pollutants under Section 307(a) of the Act were too restrictive, and that EPA had unlawfully failed to list some 25 pollutants.[1] In two other suits, NRDC alleged that EPA had failed to perform a mandatory duty under Section 307(a) to promulgate final health-based effluent standards within the time required by the Act for nine pollutants which the Agency had listed as toxic.[2] In the fourth suit, NRDC alleged that EPA had failed to promulgate pretreatment standards within the time required by Section 307(b).[3]

NRDC and EPA ultimately negotiated a settlement of these cases. The primary feature of this agreement—paragraph 7 of the decree—allowed EPA to regulate toxic pollutants and establish pretreatment standards on an industry-by-industry basis, using the technology-based criteria found in Sections 301(b)(2)(A) and 306 of the Act, 33 U.S.C. 1311(b)(2)(A) and 1316.[4] EPA preferred this approach to the health-based, pollutant-by-pollutant method appar-

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[1] *NRDC* v. *Train*, No. 2153-73 (D.D.C. filed Dec. 7, 1973).

[2] *Environmental Defense Fund* v. *Train*, No. 75-0172 (D.D.C. filed Feb. 6, 1975); *Citizens for a Better Environment* v. *Train*, No. 75-1698 (D.D.C. filed Oct. 15, 1975).

[3] *NRDC* v. *Agee*, No. 75-1267 (D.D.C. filed Aug. 4, 1975).

[4] Section 301(b)(2)(A) requires existing point source dischargers to comply with "best available technology economically achievable" (BAT) by July 1, 1984. Section 306 requires new point source dischargers to comply with "best available demonstrated control technology" (BADT).

ently envisioned by Section 307(a). Paragraph 7 also set forth a mutually acceptable timetable for promulgating these regulations (Pet. App. 164a). Appendix A to the decree identified the pollutants, and Appendix B identified the industrial categories, which were to be the focus of EPA's inquiry under paragraph 7 (Pet. App. 177a-194a).[5] However, under the criteria set out in paragraph 8 of the decree,[6] EPA could exclude from such regulations any listed pollutant or industrial category (*id.* at 166a). The provisions of paragraph 7, though the most important at the time, are not challenged by petitioners here. See Pet. App. 12a-13a n.7.

In addition, the decree included several provisions, the principal subjects of the instant dispute, that committed EPA to follow certain procedures and criteria in deciding whether to undertake additional regulatory measures. None of these provisions bound the Agency to particular substantive outcomes; however, they have guided the Agency's approach to the development of regulations under the Act. Paragraph 4(a) requires EPA to set pretreatment standards for certain pollutants, not listed in the decree, which meet the statutory criteria for pretreatment regulation (Pet. App. 162a-163a). Paragraphs 4(b) and 4(c)[7] direct the Agency to "identify" industrial categories that discharge certain pollutants, as well as other

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[5] In addition, under paragraph 13 of the decree (Pet. App. 171a), EPA was to promulgate pretreatment standards for eight industrial categories according to the "best practicable control technology currently available" (BPT), found in Section 301(b)(1)(A) of the Act, 33 U.S.C. 1311(b)(1)(A).

[6] The criteria of paragraph 8 are more detailed and specific than the statutory criteria of Section 307(a)(1), 33 U.S.C. 1317(a)(1).

[7] Paragraph 4(c) was added to the decree in 1979.

pollutants warranting controls (Pet. App. 141a-142a, 163a). The process specified in paragraph 4(c) is not explicitly required (though it is certainly permitted) by the Act. Paragraph 4(c) also requires that EPA undertake regulatory action at the completion of this "identification" process (Pet. App. 141a-142a). Paragraph 8 of the decree contains criteria, not explicitly set out in the statute, for exclusion of industrial categories and pollutants covered by the decree from regulation (Pet. App. 166a-168a, 147a-148a). Paragraph 12 of the decree requires EPA to establish a program under specified procedures not required by the Act, to determine whether regulations more stringent than the paragraph 7 technology-based regulations were necessary to ensure the maintenance of specified uses for receiving waters (Pet. App. 170a).[8]

NRDC and EPA jointly presented the agreement to the court for approval. After considering objections to the decree raised by several petitioners and other industry-intervenors,[9] the district court entered an order on June 9, 1976, approving the agreement and directing EPA to comply with its terms (Pet. App. 149a-156a). Prior to approving the decree, however, the court required changes in the agreement to ensure that it would not be called upon to "review substantive judgments made by the Administrator * * * but will merely ensure good faith compliance with the provisions of the agreement" (Pet. App.

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[8] Paragraph 12 was substantially modified in 1979 to make its requirements more specific and detailed. See Pet. App. 147a-148a.

[9] Although not all of the industry intervenors are currently petitioners in this Court, we will refer to them collectively, for convenience, as "petitioners."

151a). The court found that the decree as so modified constituted a "classic settlement" of the parties' disputes (Pet. App. 154a) and a "just, fair and equitable resolution of the issues raised * * *" (Pet. App. 156a). No appeal was taken from this order.

2. By 1976, EPA had encountered unforeseen difficulties in meeting some of the deadlines set forth in the decree. NRDC therefore moved for an order holding EPA in contempt for failing to comply with the decree. In response, EPA moved to modify the decree by, inter alia, obtaining more time to promulgate technology-based regulations under paragraph 7 of the decree and expanding the criteria by which it could exclude pollutants and industries from regulation under paragraph 8. Petitioners moved to vacate the decree on the grounds that: (1) the 1977 Amendments to the Act supplanted the decree or rendered the underlying litigation moot; and (2) the decree circumvented applicable public notice and comment requirements.

Thereafter, NRDC and EPA settled their pending motions by agreeing to and proposing to the court certain modifications of the original decree. The primary modifications extended the deadlines for promulgating paragraph 7 regulations, as requested by EPA (Pet. App. 142a-143a); expanded the criteria by which EPA could exclude pollutants and industrial categories from regulations, as requested by EPA (*id.* 143a-146a); and set forth a more detailed procedure for the Agency to follow in deciding whether to undertake additional rulemakings under paragraphs 4 and 12 (*id.* 141a and 147a). On March 9, 1979, the district court entered an order modifying the decree as requested by NRDC and EPA, and denying petitioners' motion to vacate (Pet. App. 121a).

3. Petitioners appealed that order to the court of appeals. The court of appeals affirmed the district court judgment with respect to each of petitioners' explicit contentions, but it remanded the case to the district court to determine whether the consent decree impermissibly infringed on the Administrator's discretion in implementing the Clean Water Act (Pet. App. 99a-100a).

On remand, petitioners filed a motion to vacate or, alternatively, to revise the decree on the "impermissible infringement" grounds suggested by the court of appeals. Both EPA and NRDC opposed petitioners' motion, contending that the decree did not impermissibly constrain the Agency's discretion. EPA also filed a cross-motion to modify the decree, contending that circumstances had changed sufficiently since the decree was last modified that further modifications were warranted. See Defendants' Memorandum in Opposition to Intervenors' Joint Motion to Vacate or, Alternatively, to Revise the Decree and in Support of Defendants' Cross-Motion to Modify the Decree at 26 (hereinafter "Defendants' Memorandum"). The Agency sought (1) further extensions of the paragraph 7 timetables for proposing and promulgating technology-based regulations and (2) deletion of the provisions of the decree that were not expressly mandated by the Act but were within the Agency's discretion. NRDC opposed this motion.

Specifically, EPA, like petitioners, sought deletion of paragraphs 4(b), 4(c), 6, 7(c), 11, 12, 13, and 14 of the decree, and amendments to paragraphs 4(a), 7(a), 7(d), and 10. The respects in which EPA's requested relief differed from that of petitioners were that EPA would modify paragraph 8 to permit exclusion for reasons other than those listed and to per-

mit Federal Register publications of exclusions under the paragraph rather than affidavits, while petitioners would have deleted paragraph 8; and petitioners would have deleted paragraph 19—which is essentially a savings clause (Pet. App. 148a). See defendants' Memorandum at 32 n.24. Unlike petitioners, however, EPA did not attack the legality of the decree ab initio, but urged that changed circumstances justified its proposed modifications.[10]

By order of February 5, 1982, the district court denied petitioners' motion to modify the decree, holding that the decree did not impermissibly constrain the Agency's discretion (Pet. App. 103a). On May 7, 1982, the court denied EPA's cross-motion to modify, concluding that EPA had presented insufficient grounds for its request (Pet. App. 117a).

EPA subsequently filed a motion for reconsideration of the district court's May 7 order insofar as it denied EPA's request for more time to propose and promulgate technology-based regulations under paragraph 7 of the decree.[11] The Agency supported its request with more detailed and extensive evidence as to

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[10] EPA argued that "[e]xtra obligations not required by statute necessarily infringe on EPA's ability to allocate its limited resources in the way it finds best" (Defendants' Memorandum at 30) and that, in light of changed circumstances, a new Administrator, appointed after a change in presidential administrations, was entitled to allocate resources and make policy judgments within the discretion vested in the Administrator by statute (*ibid.*). During the period the cross-motion was pending in district court, EPA continued to carry out the terms of the decree.

[11] The court's May 7 order directed EPA to promulgate regulations for all remaining categories within one year.

the need for additional time. By order dated October 26, 1982, the district court granted this motion.[12]

4. Petitioners appealed the district court's denial of their motion to vacate and the denial of EPA's cross-motion to modify. EPA did not appeal the May 7 order denying its cross-motion, but opposed petitioners' position in the court of appeals.

The court of appeals affirmed on a divided vote (Pet. App. 1a-44a). The court rejected petitioners' contention that provisions not expressly mandated by statute, but within the Agency's discretion, could not properly be included in the decree. The court relied on *United States* v. *Armour & Co.*, 402 U.S. 673, 681-682 (1971), and *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975). See Pet. App. 17a-22a. The court also rejected petitioners' claim that these "nonstatutory" provisions of the decree impermissibly infringe on EPA's discretion in implementing the Act. The court noted that the decree had not only been consented to, but largely formulated by EPA, and that the provisions of the decree challenged by petitioners did not compel EPA to take any specific substantive action or prescribe the content of any final rule. The court also reaffirmed its earlier holding (Pet. App. 56a-71a), based on legislative history regarding the 1977 Amendments to the Act, that "Congress implicitly expected the settlement agreement to continue in effect," and considered this to be further support for its view that the decree does not impermissibly infringe on EPA's discretion under the Act (*id.* at 28a).

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[12] On two subsequent occasions the district court has further extended the paragraph 7 schedules on EPA's request, by orders dated August 2, 1983, and January 6, 1984.

In dissent, Judge Wilkey stated that an Article III court cannot command an Executive Branch agency "to exercise its administrative discretion in a particular way * * *," and concluded that through the provisions of this consent decree, the court exceeded the bounds of its Article III authority by requiring EPA to apply decisionmaking criteria "not found in" the statute and to "undertake programs that are not required by the statute" (Pet. App. 32a-33a).

ARGUMENT

Petitioners seek an order vacating or substantially modifying a consent decree entered into by the Administrator of the Environmental Protection Agency in 1976, establishing a "detailed program for developing regulations to deal with the discharge of toxic pollutants" (Pet. App. 9a) under the Clean Water Act, 33 U.S.C. 1251 *et seq.* Petitioners contend that certain provisions of the decree—those not explicitly mandated by the Act—exceed the power of an Article III court by constricting the exercise of statutory discretion by the Administrator. Petitioners thus mount a broad-based challenge to the enforceability of consent decrees that purport to bind an executive branch official and his successors in office to exercise their discretion in a particular manner.[13]

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[13] Petitioners also challenge the court of appeals' 1980 holding (Pet. App. 56a-71a) that the 1977 Amendments to the Act did not supersede the consent decree. We do not consider this issue of sufficient importance to warrant this Court's review. It is essentially of importance to this lawsuit alone, was addressed comprehensively and responsibly by the court of appeals, and stands—for reasons discussed at pages 14-15, *infra*—soon to become moot.

The issue raised is of undoubted importance. See, *e.g.*, *National Audubon Society* v. *Watt*, 678 F.2d 299 (D.C. Cir. 1982); *Ferrel* v. *Department of Housing & Urban Development*, appeal pending, No. 83-2038 (7th Cir.); *Alliance to End Repression* v. *Department of Justice*, appeal pending en banc, No. 83-1853 (7th Cir.); *Adams* v. *Bell*, appeal pending, No. 83-1590 (D.C. Cir.). At each extreme, the applicable principles are more or less apparent. In circumstances where an agency can obviate litigation (and a potential finding of liability) by committing itself to a course of action that is substantively in accord with the agency's intentions and of relatively brief duration, the agency should be permitted to enter into, and the court to enforce, an appropriate consent decree.[14] At the other extreme, a consent decree can extend so far in time, and constitute such an extensive restriction on the discretion of an executive branch official and his successors, that it would overstep the official's authority to enter. Similarly, an order or decree that cuts so deeply into the discretion of the executive branch may be beyond the authority of the courts to enforce. See *Rizzo* v. *Goode*, 423 U.S. 362, 378-379 (1976); *Laird* v. *Tatum*, 408 U.S. 1, 15 (1972); *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Even an order or decree that is appropriate when entered can become inappropriate if (through elections or otherwise) the policy of the agency changes and the decree becomes an interference with the ability of agency officials to exercise their discretionary authority. Under traditional principles of equity,

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[14] Thus, if petitioners are contending that an agency lacks the power to enter, and the court the power to enforce, *any* decree that constrains the agency's statutory or constitutional discretion, no matter how briefly or modestly, we cannot agree.

and in deference to the congressional judgment that certain decisions should be entrusted to agency discretion, there accordingly may come a time when an order or decree should be vacated or substantially modified, and the authority to execute the law in the first instance restored to the executive branch. See *Spangler* v. *Pasadena City Board of Education*, 611 F.2d 1239 (9th Cir. 1979), on remand from 427 U.S. 424 (1976); *Philadelphia Welfare Rights Organization* v. *Shapp*, 602 F.2d 1114, 1120 (3d Cir. 1979); cf. *Mayor of Philadelphia* v. *Educational Equality League*, 415 U.S. 605, 622-623 (1974).[15]

Despite the importance of this issue, however, we believe this is an inappropriate case for addressing it, for the following reasons.

1. Most prominent among the factors counselling against certiorari in this case is that the Administrator, the scope of whose discretion is at stake, in fact *supports* the consent decree here.[16] Even assuming

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[15] Thus, if the court of appeals has concluded that government consent decrees are identical to private consent decrees with respect to the standards of *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 236 n.10 (1975); *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244, 248 (1968); and *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932), we cannot agree. If a private party agrees, on behalf of himself, his heirs, successors, and assigns, to a decree that constricts his options beyond the requirements of the law, he has merely struck a bad bargain. If a government official does the same, he is purporting to bargain away the right of the people to a government run by their elected officials.

[16] In the district court, the Administrator opposed petitioners' motion to vacate or revise the decree, but made a cross-motion to modify the decree. The Administrator's cross-motion was substantially similar to petitioners' motion to revise the decree. See pages 7-8, *supra*. However, the Administrator

the standing of petitioners to raise the issue,[17] the separation of powers question they bring to this Court is presented in an awkward and atypical context, since the executive official whose powers have purportedly been infringed has been aligned in the litigation against his putative champions. It is also significant that, unlike in the typical consent decree controversy, Congress has implicitly sanctioned the substantive terms of this decree. See Pet. App. 56a-71a.

The agency itself is in the best position to assess whether its discretion has been seriously curtailed, as a practical and not merely an abstract matter, and whether the consent decree entered into by a previous Administrator now frustrates legitimate changes of

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decided not to appeal the denial of the cross-motion, and opposed petitioners' position in the court of appeals. The current intention of the Administrator is to fulfill the few remaining requirements of the decree. See pages 14-15, *infra*.

[17] Standing to sue under the Clean Water Act is, of course, exceptionally broad. Here, petitioners suffer no injury from continued implementation of the consent decree that would be sufficient to satisfy ordinary principles of standing. Even if the decree were vacated, the Administrator would remain free to carry out its terms. Thus, any benefit to petitioners from a judicial remedy in this litigation is purely speculative. See *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976). Moreover, since the decree governs only the pre-proposal stages of formulating regulations, there is no current injury to petitioners, and may never be. Petitioners will have a full opportunity to comment on any proposals that may ensue, and, if necessary, to challenge any final rules in court. The instant dispute therefore does not appear ripe for review. See generally *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167 (1967).

policy and approach. Here, the Administrator has indicated his willingness to abide by the terms of the decree. That casts considerable doubt on petitioners' proposition that the decree is an impermissible usurpation of his discretion.

Indeed, the separation of powers problems inherent in the consent decree context will remain inchoate until such time as the decree *in fact* prevents an Administrator from choosing and effectuating his policies. So long as succeeding Administrators remain content with the terms of a decree, it is difficult to see why separation of powers concerns should enable private parties to disturb the arrangement. In any event, we can see no reason for this Court to address the thorny problems raised by petitioners in this abtract context.[18]

2. Moreover, the controversy over this consent decree has become largely academic. In February 1982, EPA completed all tasks under paragraph 12 of the decree, which required the Agency to identify all geographic

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[18] It should also be noted that this consent decree is not typical of the methods usually chosen by the Agency to compromise litigation. Normally, a consent decree simply recites the Agency's intention to propose taking whatever action is agreed upon by the litigants. The lawsuit is stayed pending final action on the proposed revisions contained in the settlement agreement. If, after notice and comment, the Agency adopts a final course that is at odds with the original proposal, the other parties to the consent decree retain the right to reinitiate the litigation or to file a new lawsuit. In this manner, there is full opportunity for public participation, and the Agency retains discretion over the content of the ultimate rule. Moreover, future Administrators retain the ability to change the Agency's course or priorities through administrative action, without being required to obtain leave of court.

areas and toxic pollutants for which additional controls might be necessary after the technology-based requirements are established under paragraph 7 of the decree, and to publish its strategy for implementing such controls. And on March 13, 1984, EPA completed the tasks set forth in paragraph 4(c) of the decree, which required the Agency to identify additional pollutants, beyond the "priority" toxic pollutants listed in Appendix A to the decree, which might warrant pretreatment regulations under the Act.

Paragraph 8 of the consent decree has been substantially implemented. It sets forth the criteria by which EPA may exclude pollutants or industries from the technology-based regulations developed under paragraph 7. To date, EPA has promulgated paragraph 7 regulations for 20 of the 37 industrial categories listed in paragraph 7. It has already excluded from such regulation 10 entire categories and more than 100 subcategories of other categories based on the paragraph 8 criteria. Regulations for the remaining paragraph 7 industrial categories are scheduled to be promulgated by no later than February 1985.

Moreover, upon completing the paragraph 7 technology-based regulations for all remaining industrial categories, EPA will have discharged *all* of its obligations under the decree and will then be entitled to vacation of the decree and dismissal of the underlying lawsuits. Thus, there is a significant possibility that the issues petitioners tender for review will have become moot by the time this Court could render a decision on the merits if the petition were granted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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